



February 21, 2017

United States Copyright Office
Library of Congress
Docket No. 2015-7

Re: Section 512 Study; Request for Additional Comments

The [Wikimedia Foundation](#) respectfully submits these comments in response to the Copyright Office's [notice of inquiry](#), published November 2, 2016, regarding a public study of 17 U.S.C. 512. We are a non-profit and charitable organization that operates a [family of websites](#), called "projects". Those projects include [Wikipedia](#), the Internet's largest and most popular general reference work, and [Wikimedia Commons](#), a database of millions of freely usable media files.

Introduction

The discussion of section 512 so far has highlighted the need for additional research into the functioning of the current system and potential changes to the system. As the notice of inquiry notes, reports from different stakeholders have varied significantly regarding the effectiveness, burdens, and costs of the notice-and-takedown process. It would be difficult and unwise to try to navigate and reconcile these conflicting reports without reliable evidence (not anecdotal, and preferably not self-reported) on which to base conclusions.

In particular, further investigation is needed into how section 512 does or does not cause the difficulties creators have reported under the current system, whether proposed changes would actually address those difficulties, and whether proposed changes are financially and technically feasible. Especially given the potential consequences a mandatory filtering regime may have, including raising barriers to entry for potential new online platforms and

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making the system easier to co-opt for censorship and other non-copyright purposes, it is important that any such proposed change undergoes thorough investigation.

Another theme that has emerged is the need for better communications channels with the general public. Understandably, the most prominent voices in the section 512 discussion so far have been those of rightsholders and service providers. The voices of the general public are at least as important, but they do not have nearly as much amplification in the form of lawyers and policy professionals who watch for notices of inquiry in the Federal Register from the Copyright Office and take the time to respond to them. It is necessary to engage with individual Internet users over copyright issues in spaces where they do make their voices heard, and potentially create such spaces specifically for copyright discussions.

Subjects of Inquiry

1. How should any improvements in the DMCA safe harbor system account for the great diversity among the categories of content creators and ISPs who comprise the Internet ecosystem?

Before recommending ways that “categories” of content creators or ISPs should be treated differently, we need a better understanding of what those categories are. There is currently insufficient research into what types of service providers and content creators there are, and how possible changes to the safe harbor system might affect them, to define categories clear enough to be the basis of legal distinctions. Last year’s [study](#) from researchers Urban, Karaganis, and Schofield defines three broad groups of service providers, but their categorization is based on the provider’s relationship with the DMCA system itself.¹ It does not provide criteria independent from the DMCA system (such as amount of content hosted, site traffic, revenue, or number of employees) that would allow one to determine to which group a service provider belongs. Additional research would be needed in order to define more concrete categories, as well as determine whether it is possible to define such categories at all.

¹ The groups are: (1) “DMCA Classic”, service providers which receive relatively few notices and generally review them manually; (2) “DMCA Auto”, service providers which receive large numbers of notices and process them using automated systems; and (3) “DMCA Plus”, service providers which have implemented technology beyond section 512’s requirements. Jennifer M. Urban, Joe Karaganis, and Brianna L. Schofield, [“Notice and Takedown in Everyday Practice”](#), UC Berkeley Public Law Research Paper No. 2755628 (2016).

Broadly speaking, different service providers do have different experiences with the current DMCA safe harbor system, and “improvements” to it would affect them differently. For us, as a non-profit with a relatively small staff that hosts a large volume of material and one of the world’s most popular websites, changes to the law, particularly any additional requirements for all service providers, could have an enormous effect. The experience would likely be different for commercial service providers that have billions of dollars more than us in annual revenue, or for service providers that have fewer users than us because they target a niche audience, and especially for service providers that fit into both categories. One difficulty is knowing which of a service provider’s attributes would be relevant to which potential new requirements.

Another difficulty in creating new requirements under section 512 for only certain categories of service providers is accounting for movement among categories. If millions of new users were to sign up for a social network for spelunkers because spelunking suddenly becomes all the rage, would the social network be subject to additional requirements? If the Wikimedia Foundation unexpectedly received six times our usual amount in donations in a year, would we become subject to additional requirements? If the answer is yes in scenarios like these, then the changes to section 512 could have a significant impact on the costs and risks associated with being a service provider at all, even for categories of service providers that aren’t subject to additional requirements. This increased barrier to becoming a service provider would entrench incumbents by effectively limiting the potential growth of new service providers.

As for content creators, there seem to be two primary axes of difference that affect their relationship with the DMCA safe harbor system. The first is access to professional copyright enforcement resources, including legal teams and infringement detection technologies. This axis correlates heavily with a creator’s size (e.g., a film studio has more access to these resources than an individual filmmaker) and a creator’s independence (e.g., a musician signed to a record label has more access to these resources than an independent artist). Based on the section 512 study participation so far, creators who have less access to enforcement resources seem to be the ones struggling to make the DMCA safe harbor system work for them.

The second axis of difference is distribution method. While almost all creators nowadays use online platforms as a major means of distribution of their works, creators who also rely heavily on bookstores, movie theaters, or radio broadcasts in reaching their audiences have a different relationship with the DMCA safe harbor system than creators who almost exclusively reach their audiences using online platforms like Kindle Direct Publishing, Vimeo, or SoundCloud. The latter group comprises categories of creators whose voices have not been a significant part of the conversation about section 512 so far, but who should be accounted for in any changes to copyright law or policy.

Accounting for the diversity of content creators and service providers in making changes to the DMCA safe harbor system requires following a process of developing and evaluating targeted changes that would benefit groups that are at a disadvantage under the current system but would not undermine important benefits of the current system.

2. Are there specific issues for which it is particularly important to consult with or take into account the perspective of individual Internet users and the general public? What are their interests, and how should these interests be factored into the operation of section 512?

It is important to take the general public's interests and perspectives of the general public with regard to all copyright issues, because the copyright system exists for the purpose of benefiting the public by encouraging the creation of new works for the public to access and enjoy. It is particularly important to consult individual Internet users and the general public when considering any fundamental changes to the law that may affect the online platforms that are available to them and their relationships with those platforms.

The best way to find out what the interests of individual Internet users and the general public are would be to ask them, using less formal methods than a notice of inquiry published in the Federal Register. We can try to infer what those interests are, but our inferences are not a substitute for unbiased, methodologically sound surveys and other research.

Individual Internet users and the general public encompass a significant portion of the group of "content creators". Because of the widespread availability and use of online platforms for building, sharing, and collaborating on creative works, as well as the ubiquity

of tools for writing, taking pictures, and making audiovisual recordings, members of the general public are creating and sharing original works all the time. It seems safe to assume, then, that one of the interests of individual Internet users and the general public is the continued operation and improvement of these platforms. Considering most online platforms that host user-uploaded content can only exist because of the section 512 safe harbor system, anything that reduces protections for platforms under that system would likely not be in the interest of the general public.

The section 512 system was designed primarily by and for rightsholders and mid-'90s service providers, at a time before today's largest and most significant online platforms even existed. It was designed to make it easy to send takedown notices, and with systemic incentives for service providers to comply with those notices (see question 7). As a result, it is difficult for individual Internet users who are interacting with the system at the scale of individual notices, as well as for service providers that receive few notices and don't have their own legal teams, to be able to evaluate or challenge notices. If an individual user is informed that material they uploaded has been taken down in response to a DMCA notice, it may not be clear to them what the basis of the claim of copyright infringement is, what the next steps are, and how they might be able to rebut the infringement claim. These questions would be particularly pressing for individual users whose works relate to a current event, are part of a broader coordinated campaign, or are important for the users' revenue or public profile. These users might benefit from additional educational resources about copyright and the notice-and-takedown system (see question 9).

3. How should the divergence in views on the overall effectiveness of the DMCA safe harbor system be considered by policy makers? Is there a neutral way to measure how effective the DMCA safe harbor regime has been in achieving Congress' twin goals of supporting the growth of the Internet while addressing the problem of online piracy?

Neutral evaluation of the DMCA safe harbor regime has two parts: asking the right questions and looking to reliable sources for answers.

One aspect of how section 512 has supported the growth of the Internet is the diversity of service providers, large and small, it has helped allow, and the economic development that has resulted from online platforms. More important, though, are the ways online platforms

have facilitated communication, collaboration, creativity, and access to information. That so many of the world's dominant online platforms are based in the US is in part a result of the protections offered by section 512—combined with [section 230 of the Communications Decency Act](#) and robust first amendment free speech protections.

Social media sites like Twitter have been essential tools for organizing social and political movements around the world, from the [Arab Spring](#) to [Black Lives Matter](#). How does the DMCA safe harbor regime facilitate their sharing of essential [pictures taken at protests](#) or videos of police shootings? What effect would it have on political movements if those works could be automatically deleted as part of a filtering system?

Sites like Tumblr have allowed people to come together and build communities around common interests. Would fandoms be able to thrive online to the extent they currently do if people couldn't create and share fair use screenshots, remixes, and fan works based on their favorite films, TV shows, and music videos?

Sites like YouTube and Instagram have provided platforms for independent creators to distribute their works globally. They have helped [launch professional careers](#), popularize [new modes of expression](#), and [create new revenue models for artists](#). Could online platforms support the current unprecedented levels of creating and sharing original works without the DMCA safe harbor regime?

The Internet Archive, and its Wayback Machine in particular, have become indispensable in modern society. As a public record of the history of the Internet, the Wayback Machine is essential for everything from [political journalism](#) to [patent litigation](#). It also helps provide evidence to [support claims of copyright infringement](#). The Internet Archive's tools were used to [provide context and analysis](#) during the 2016 presidential election. What role has section 512 played in enabling these sorts of resources to exist?

These are some of the questions that need to be asked to determine how effective the DMCA safe harbor regime has been in supporting the growth of the Internet, as well as how potential changes to the regime might strengthen or weaken that support. As for “online piracy”, the questions must go beyond investigating how much copyright infringement is happening on the Internet. One key question is whether the public is generally consuming media via channels and formats that are legally acquired and properly licensed. Another is

whether the platforms that are most used for copyright infringement are complying with the current section 512 system in the first place—if they are not, then they are not likely to comply with any additional requirements placed on them.

Policy makers should base answers to all of these questions on evidence that is reliable and trustworthy. Many of the strongest voices in the Copyright Office’s section 512 study so far have been rightsholders and service providers. While it is important to consider these self-reported experiences, a handful of anecdotal data points is not sufficient basis for copyright policy. Policy makers should seek out independently-conducted research. For all research, independent or not, they should examine its methods and conclusions. If more research is needed to answer a question, then they should commission it.

The volunteers who write and edit Wikipedia have over 16 years’ experience with [identifying reliable sources](#) and striving for a [neutral point of view](#). Wikipedia’s policies and guidelines are useful resources on these topics, as they represent the distillation of Wikipedians’ wisdom.

6. Participants also noted disincentives to filing both notices and counter-notices, such as safety and privacy concerns, intimidating language, or potential legal costs. How do these concerns affect use of the notice-and-takedown and counter-notice processes, and how can these disincentives best be addressed?

To the extent that disincentives to filing notices and counter-notices exist, and more research is needed to determine the extent and comparability of such disincentives, they generally seem to hit individual Internet users and small rightsholders the hardest. When individual users are deciding whether to file a counter-notice in response to a notice from a large rightsholder, they face the intimidating costs of litigation (even if the result is ultimately in their favor), the overwhelming liability they would face in copyright infringement litigation due to astronomical potential statutory damages, concerns about submitting to US jurisdiction, and the imbalance of power between them and a large corporation or law firm. During the first round of comments and roundtables, individual creators and other small rightsholders shared the disincentives they face in the notice-and-takedown and counter-notice process, including the perception that they, too, are facing intimidating corporations in the form of online platforms. They spoke to their own inability to afford

litigation over each act of infringement, and their resulting feeling of helplessness when they receive a counter-notice.

Efforts to counter disincentives to filing notices and counter-notices should focus on providing additional support and resources to individual Internet users and small rightsholders. Likewise, those groups should be consulted in determining what sort of support and resources would be most helpful to them.

7. How could penalties under section 512 for filing false or abusive notices or counter-notices be strengthened? Would the benefits of such a change outweigh the risk of dissuading notices or counter-notices that might be socially beneficial?

Under the current system, there are few actual checks on false or abusive notices. Service providers generally presume properly formed takedown notices to be valid, and comply with them, because doing so helps them maintain their safe harbor protections. Some providers use automated systems for processing notices because they receive more than they can process by hand, and so they cannot effectively weed out false or abusive notices; other providers simply do not have the resources or knowledge to evaluate notices to determine if they are false or abusive. Individual users can oppose notices for being false or abusive by filing counter-notices, and some do, but there are disincentives to doing so (see question 6) and users generally do not have the resources to pursue a claim under 512(f) even if they want to. Because false and abusive notices go mostly unchecked, the notice-and-takedown process has proved useful as a tool for removing material for reasons unrelated to copyright,² as well as for removing potential fair use material.³

One way to strengthen penalties would be to impose statutory damages for filing false or abusive notices. Such damages may dissuade some rightsholders from filing notices at all,

² , Maira Sutton, "[Copyright Law as a Tool for State Censorship of the Internet](#)", Electronic Frontier Foundation (December 3, 2014); Scott Shackford, "[How An Anti-Piracy Law Became a Tool for Online Censorship](#)", Reason.com (April 9, 2015); Maria Schied, "[Copyright as an Instrument for Censorship?](#)", Copyright Resources Center at Ohio State University Libraries (July 29, 2015); Alex Hern, "[Revealed: How copyright law is being misused to remove material from the Internet](#)", The Guardian (May 23, 2016).

³ "About one in fourteen (7.3%) of requests were flagged with characteristics that weigh favorably toward fair use, suggesting that further review could reveal a fair use defense. Flagged requests predominantly targeted such potential fair uses as mashups, remixes, or covers; or a link to a search results page that included mashups, remixes, and/or covers." Urban et al., "[Notice and Takedown in Everyday Practice](#)", at 95–96.

but that consequence can be mitigated with informational resources about the notice-and-takedown process (see question 9). The disincentives also would be no greater than the ones that result for counter-notices from the statutory damages imposed on copyright infringement, so Congress has already concluded that such a tradeoff is acceptable.

Another option would be to preserve the safe harbor protections for intermediaries if they refuse to comply with a notice due to a good faith belief that it is false or abusive. While such a change would likely do little to prevent compliance with false and abusive notices that are processed by automated systems, it would remove some of the disincentives for service providers to comply with every notice they receive. Slightly extending safe harbor protections should not have any effect on decisions to file notices or counter-notices.

8. For ISPs acting as conduits under section 512(a), what notice or finding should be necessary to trigger a repeat infringer policy? Are there policy or other reasons for adopting different requirements for repeat infringer policies when an ISP is acting as a conduit, rather than engaging in caching, hosting, or indexing functions?

There should be no requirement on ISPs acting as conduits to implement repeat infringer policies at all—if anything, there should be a prohibition against it. [Internet service providers](#)' primary means of enforcing such a policy would be to limit or cut off their subscribers' access to the Internet. Such a penalty is extremely and overly harsh in a society that increasingly relies on the Internet for [news](#), [entertainment](#), [education](#), [communication](#), [government services](#), [employment](#), and [self-expression](#).

9. Many participants supported increasing education about copyright law generally, and/or the DMCA safe harbor system specifically, as a non-legislative way to improve the functioning of section 512. What types of educational resources would improve the functioning of section 512? What steps should the U.S. Copyright Office take in this area? Is there any role for legislation?

The purpose of creating educational resources is to help those who do not have easy access to copyright lawyers—primarily independent creators and individual Internet users—understand and navigate the notice-and-takedown system. As with finding out the

interests of the general public (question 2), the best way to learn what educational resources would most benefit those who need them the most is to ask them on a regular basis using relatively informal channels. Because the general public would be the target for these resources, it is particularly important that the resources be easy to find and use, and, if possible, that they are published in multiple languages.

10. How can the adoption of additional voluntary measures be encouraged or incentivized? What role, if any, should government play in the development and implementation of future voluntary measures?

Stakeholders may be reluctant to implement various voluntary measures because they are worried about the expense involved in doing so or about unintended side effects. There is a lack of reliable comparative research into different voluntary measures, including their implementation costs, effectiveness, and impact on online platforms as a whole. One possible role for government, and in particular the Copyright Office, would be to conduct that research itself or assist independent researchers who are doing so. The Copyright Office would then be in a position to offer stakeholders guidance on voluntary measures based on how they have worked when implemented previously.

Voluntary measures may also see more widespread adoption if they were less costly to implement. If the government were to create, or work with partners to create, a repository of free and open source software and resources for developing and implementing voluntary measures, it could go a long way toward making those measures accessible to more service providers. Freely available and modifiable systems both defray the costs of adopting such tools and allow service providers to adapt them to their particular needs.

11. Several study participants pointed out that, since passage of the DMCA, no standard technical measures have been adopted pursuant to section 512(i). Should industry-wide or sub-industry-specific standard technical measures be adopted? If so, is there a role for government to help encourage the adoption of standard technical measures? Is legislative or other change required?

When it was drafted, section 512(i) was perhaps overly optimistic in both the process and outcomes it envisioned. The section 512 study has shown, yet again, that it is difficult to

achieve a “broad consensus of copyright owners and service providers” on any issue, let alone to get stakeholders to agree to “an open, fair, voluntary, multi-industry standards process”.

It is also difficult to think of a technical measure that would be applicable to the wide variety of service providers and that would “not impose substantial costs on service providers or substantial burdens on their systems or networks.”

12. Is some version of a notice-and-stay-down system advisable? Please describe in specific detail how such a system should operate, and include potential legislative language, if appropriate. If it is not advisable, what particular problems would such a system impose? Are there ways to mitigate or avoid those problems? What implications, if any, would such a system have for future online innovation and content creation?

A mandatory filtering, or “notice-and-stay-down”, regime is not advisable. In [our submission as part of the first round of comments](#), we focused on why mandatory filtering would be impractical to implement and unnecessary for service providers like us. Developing filtering technology is extremely costly—YouTube’s Content ID system [took \\$60 million to develop over 9 years](#)—and even at its best is prone to false positives and cannot properly take fair use considerations into account. The Wikimedia projects are designed to host public domain and freely licensed content, and have user-driven processes to review and remove material that falls outside the projects’ scope. That we receive [fewer than 50 DMCA notices per year](#) for the tens of millions of files and articles we host is testament to the effectiveness of these community processes. Mandatory filtering would be a significant drain on our limited resources, would interfere with our current effective processes, and would not improve responsiveness to potential copyright infringement.

There are deeper concerns about creating a mandatory filtering system, beyond the practical barriers to ensuring it is useful, effective, and balanced. A tool designed to detect undesirable material and automatically remove it can be used to target anything. In this case, it would be trying to address copyright infringement, but the same technology would work just as effectively for other ends, including widespread censorship. We have seen the current notice-and-takedown process misused to remove material for reasons unrelated to

copyright.⁴ A completely automated system that all service providers are required to implement would be an even more tempting and useful tool for those who want to silence critics, bury historical facts, or otherwise interfere with the free flow of information. Of course, some service providers choose to use some form of filtering technology as a voluntary measure, absent statutory requirements. But, importantly, they can also choose not to, and they can choose how they implement and respond to the filtering technology. Mandatory filtering would remove that choice, and create a system where material can be automatically removed across all platforms.

It would be theoretically possible to mitigate the practical implementation concerns regarding mandatory filtering by improving the technology so it is more accurate, context-aware, and affordable. However, the concerns about how the technology could be used beyond copyright are more fundamental. The only way to avoid them is not to require the use of filtering technology in the first place.

Conclusion

Section 512 is crucial to the functioning of many of the most popular and important segments of the Internet, and the creative expression that happens there. It is imperative to thoroughly evaluate any proposed changes to the DMCA safe harbor system for the impact they would have on the operation of online platforms. We hope that the empirical research studies submitted in response to this notice of inquiry contribute to that process of evaluation, and that there are more to come before any changes to copyright law are recommended.

Sincerely,
Wikimedia Foundation

⁴ See footnote 2.